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FIRST NATIONAL BANK OF
8 NORTHERN CALIFORNIA,
KATHY CASTOR, and RANDY BRUGIONI
9

10 UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12

13 NICK MAKREAS,

14 Plaintiff,

15 v.

16 FIRST NATIONAL BANK OF NORTHERN
17 CALIFORNIA, a business entity, Form
Unknown; T.D. SERVICE COMPANY a
18 business entity, Form Unknown; KATHY
CASTOR, an individual; RANDY BRUGIONI,
19 an individual; COUNTY OF SAN MATEO; SAN
MATEO COUNTY SHERIFF'S OFFICE; SAN
20 MATEO COUNTY SHERIFF GREG MUNKS,
in his individual and official capacity; SAN
21 MATEO COUNTY SHERIFF'S DEPUTY
STEPHEN DUVALL, in his individual and
22 official capacity; SAN MATEO COUNTY
SHERIFF'S DEPUTY HOSS, in his individual
23 and official capacity; SAN MATEO COUNTY
SHERIFF'S DEPUTY VALENCIA, in his
24 individual and official capacity; Employees
DOES 1 through 25 INCLUSIVE, in their
25 individual and official capacity; and DOES 26
through 50 INCLUSIVE, et al.,

26 Defendants.
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CASE NO. CV-11-02234 JST

HONORABLE JON S. TIGAR

**DEFENDANT FIRST NATIONAL BANK
OF NORTHERN CALIFORNIA'S
OPPOSITION TO PLAINTIFF NICK
MAKREAS' MOTION IN LIMINE NO. 1
TO EXCLUDE EVIDENCE OF
SETTLEMENT NEGOTIATIONS,
INCLUDING PLAINTIFF'S REQUEST
FOR AND THE AVAILABILITY OF
ATTORNEY'S FEES**

Pretrial Conference Date:

November 19, 2013

Time: 1:00 p.m.

Dept.: Courtroom 9

Trial Date: December 9, 2013

1 Defendant First National Bank of Northern California, (“FNBNC”), hereby opposes, in
 2 part, Plaintiff Nick Makreas’ (“Plaintiff”) Motion in Limine No. 1 to Exclude Evidence of
 3 Settlement Negotiations, Including Plaintiff’s Request for and the Availability of Attorney’s Fees.
 4 (“Motion”).

5 Through the Motion, Plaintiff seeks to exclude evidence (1) regarding settlement
 6 negotiations between Plaintiff and FNBNC, and (2) Plaintiff’s request for and the availability of
 7 attorney’s fees. *See* Motion, 2:16-5:12.

8 FNBNC does not oppose the Motion to the extent that it seeks to exclude evidence of
 9 Plaintiff’s request for and the availability of attorney’s fees.

10 FNBNC opposes the Motion insofar as it seeks to exclude rebuttal evidence regarding
 11 offers by FNBNC to compensate Plaintiff for personal property. Such evidence would rebut
 12 evidence introduced by Plaintiff that FNBNC did not offer to compensate Plaintiff for allegedly
 13 lost personal property. FNBNC’s opposition herein is made in conjunction with FNBNC’s
 14 opposition to Plaintiff’s Motion In Limine No. 3.

15 The basis of the Motion to exclude evidence regarding settlement negotiations is that
 16 settlement negotiations between Plaintiff and FNBNC are inadmissible under Federal Rule of
 17 Evidence 408 and 403. For the reasons set forth herein, the Motion should be denied.

18 FNBNC’s evidence, that it offered to compensate Plaintiff for personal property, to be
 19 offered in response to Plaintiff’s introduction of evidence to the contrary, is not inadmissible
 20 under Rule 408, because FNBNC’s evidence would be offered for limited rebuttal and
 21 impeachment purposes.

22 “Evidence of an offer or acceptance of an offer to compromise a disputed claim is not
 23 admissible ‘to prove or disprove the validity or amount of a disputed claim or to impeach by a
 24 prior inconsistent statement or a contradiction.’ *See* Rutter Group Prac. Guide, (*Fed. Civ. Trials*
 25 *& Evid.*), Ch. 8I, § 8:4340 (2013) (*citing* Fed. R. Evid. 408(a)). “Evidence of conduct or
 26 statements made in compromise negotiations is not admissible.” *Id.* (*citing* Fed. R. Evid.
 27 408(a)(2)). However, “[t]he court may admit this evidence for another purpose, such as proving a
 28

1 witness's bias or prejudice, negating a contention of undue delay..." Fed. R. Evid. 408(b)
 2 (emphasis added).

3 Notably, the court may admit settlement offers "for rebuttal or limited impeachment
 4 purposes." See Rutter Group Prac. Guide, (*Fed. Civ. Trials & Evid.*), Ch. 8I, § 8:4376.7 (2013)
 5 (emphasis added) (*citing Kraft v. St. John Lutheran Church of Seward, Neb.*, 414 F.3d 943, 947
 6 (8th Cir. 1984)) ("[Plaintiff's] acknowledgment during settlement negotiations of causal
 7 connection between sex abuse and psychological injuries was admissible when offered to rebut
 8 testimony of [plaintiff's] expert that [plaintiff] did not realize connection until later date."); see
 9 also *Freidus v. First Nat'l Bank of Council Bluffs*, 928 F.2d 793,794-95 (1991) (in breach of
 10 contract action against defendant bank for unreasonable failure to provide consent to proposed
 11 sale of real estate, evidence of letters exchanged during settlement negotiations were admissible to
 12 rebut testimony offered by plaintiff that up to the date of trial the bank had failed to give any
 13 reasons for the conditions the bank had imposed on giving its consent. The court found that such
 14 testimony, if left un rebutted, would have been devastating to the bank's position that it had not
 15 unduly delayed giving its consent.).

16 "The importance of informing the jurors fully so that they can carefully judge the
 17 credibility of each witness in making their fact determination may in some situations outweigh the
 18 desire to encourage settlements." *Reichbach v. Smith*, 528 F. 2d 1072, 1075 (5th Cir. 1976); see
 19 also Fed. R. Evid. 608(b) (permitting specific instances of a witness's conduct to be inquired into
 20 on cross-examination if probative of the character for truthfulness or untruthfulness of the
 21 witness).

22 Here, evidence that FNBNC's counsel communicated multiple offers to compensate
 23 Plaintiff for personal property will be used to rebut and impeach Plaintiff's testimony that
 24 FNBNC did not compensate or make any offer to compensate Plaintiff for personal property.
 25 Such evidence negates any contention that FNBNC unduly delayed in offering to compensate
 26 Plaintiff for personal property. Accordingly, such evidence is admissible under Federal Rule of
 27 Evidence 408.

1 Additionally, evidence that FNBNC offered to compensate Plaintiff for personal property
 2 items should not be excluded under Federal Rule of Evidence 403 because it is not unfairly
 3 prejudicial to Plaintiff. “The court may exclude relevant evidence if its probative value is
 4 substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing
 5 the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative
 6 evidence.” Fed. R. Evid. 403.

7 Evidence that FNBNC’s counsel communicated multiple offers to compensate Plaintiff for
 8 his personal property items would not be unfairly prejudicial to Plaintiff under Rule 403 if such
 9 evidence is only offered after Plaintiff opens the door by claiming that Plaintiff has never been
 10 offered payment by FNBNC to compensate Plaintiff for his allegedly lost personal property.
 11 Moreover, evidence of such offers by FNBNC is unlikely to be construed as evidence of the
 12 invalidity of Plaintiff’s claims. If anything, the opposite is true. Normally, a defendant would
 13 want to keep out any evidence of a settlement offer made to plaintiff because the offer suggests
 14 that there is merit to plaintiff’s claim.

15 Accordingly, Plaintiff’s Motion insofar as it seeks to exclude evidence of FNBNC’s offer
 16 to compensate Plaintiff for personal property items should be denied, at least in so much as such
 17 evidence might be offered in rebuttal to evidence of no offers to restore or pay for the allegedly
 18 lost property.

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 20 DATED: November 12, 2013

FRIEDEMANN GOLDBERG LLP

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 22 By: /s/ John F. Friedemann
 23 JOHN F. FRIEDEMANN
 24 Attorneys for Defendant FIRST NATIONAL
 25 BANK OF NORTHERN CALIFORNIA,
 26 KATHY CASTOR, and RANDY BRUGIONI
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